United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7481

To Be Argued By
DANIEL RIESEL

ORIGINAL

13
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Cal. No. 759

ODESSA CARRION,
Plaintiff-Appellant,

—against—

YESHIVA UNIVERSITY,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

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ODESSA CARRION,

Plaintiff-Appellant,

-against-

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BRIEF OF DEFENDANT-APPELLEE

STATEMENT OF THE ISSUES

I.

Did the Trial Court abuse its discretionary authority by awarding counsel fees to defendant, a private educational institution, that had successfully defended a vexatious and meritless law suit?

II.

Was the Trial Court correct in determining that the plaintiff's constitutional rights were not abridged by

her discharge for insubordination when the plaintiff was not denied liberty or property and the facts clearly demonstrated that she was insubordinate?

III.

Were the Trial Court's detailed findings that plaintiff had not been discriminated against by reason of her race clearly erroenous?

IV.

Did the Trial Court abuse its discretionary authority by declining to adjourn the trial for the testimony of plaintiff's last witness when the witness' prior testimony had been placed in evidence as a substitute for his live testimony and that testimony could not have affected the outcome of the case?

STATEMENT OF THE CASE

This is an appeal from the judgment of Judge Whitman Knapp of the Southern District of New York dismissing the complaint of the Plaintiff-Appellant, Odessa Carrion, at the close of plaintiff's case after a two day bench trial.

The complaint in this action, filed on July 6, 1971, alleged that plaintiff had been discriminated against because of her race by defendants New York and Yeshiva Universities in violation of her rights under Title 42, United States Code §§ 1981, 1983 and 2000e et seq. Thereafter, plaintiff moved for a preliminary injunction and Yeshiva University (hereafter "Yeshiva") moved for summary judgment. On April 18, 1972, Judge Tenny denied both motions because of his conclusion that there were factual issues that would have to be tried (307a)[1/]. On November 27, 1973, plaintiff successfully moved to amend her complaint to include an allegation that she had been denied due process of law because the American Federation of State, County and Municipal Employees conducted a hearing regarding charges against her although she was not present at said hearing (8a). Subsequently, extensive pretrial discovery was conducted by plaintiff and Yeshiva.

This action was set down for trial at the beginning of May but upon the application of plaintiff's then counsel it was adjourned to May 21, 1975 when a bench trial before Judge

1/ References to "a" are to pages of the joint appendix. References to "R" are to the record filed with the court.

Whitman Knapp commenced.

On the eve of trial, plaintiff agreed to a voluntary dismissal of the defendant, New York University, after counsel for that institution threatened to apply for counsel fees upon certain vindication at trial.

At the conclusion of plaintiff's case, the District Court dismissed the complaint and dictated its opinion and findings into the record (128a-137a). Thereafter, both parties submitted additional proposed findings of fact and conclusions of law. On June 13, 1975 the defendant, Yeshiva University, moved pursuant to Section 2000e-5(k) of Title 42, United States Code for the imposition of reasonable attorney's fees and for an award of discretionary costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

On July 28, 1975, Judge Knapp filed a memorandum and order stating that he had "carefully reviewed defendant's submissions" and found "them to be in substantial accord with my view of the facts and the law". Judge Knapp further provided that such findings of fact, as submitted by the defendant and modified by him, were "deemed to be supplemental to those made on the record in open court at the close of plaintiff's case" (285a). On July 28, 1975 Judge Knapp also filed a memorandum opinion awarding counsel fees in the amount of

$5,000 and certain of the discretionary costs to the defendant (p.317a-318a). Judge Knapp's decision with respect to counsel fees is reported at 397 F. Supp. 852.

STATEMENT OF THE FACTS

The Plaintiff-Appellant, Odessa Carrion, is a Black Citizen of the United States. Her amended complaint alleges that her former employer, Yeshiva, discriminated against her on account of her race by refusing to promote her to three positions then being staffed by Yeshiva at Lincoln Hospital. The complaint also alleges that she was wrongfully discharged from her job in violation of her constitutional rights and because of her race (4a-12a).

(a) Yeshiva at Lincoln Hospital.

Yeshiva is a corporation organized under the education laws of the State of New York. The Albert Einstein College of Medicine (hereafter "AECOM") is a division of Yeshiva. AECOM, one of several distinguished colleges of Yeshiva, is a well known institution engaged in the education and training of physicians. Yeshiva maintained, during the relevant period, an "affiliation contract" with the City of New York. That contract, essentially an aspect of AECOM'S intern and residency programs, required AECOM to furnish

Lincoln Hospital with doctors as well as certain "ancillary" personnel. This latter category included social workers such as the plaintiff-appellant (101a;R.44,P.174).

Lincoln Hospital is a municipal hospital located in the Bronx and owned and operated by the City of New York (138a). Under the terms of the affiliation contract, it was (and still is), the City's obligation to maintain and operate the hospital with adequate personnel and sufficient supplies including all the physical facilities and equipment (227a).

Pursuant to the affiliation contract, Yeshiva had the right and obligation to hire, supervise and discharge personnel that it employed at Lincoln Hospital (237a). The City's control over Yeshiva personnel, circumscribed by the terms of the affiliation contract, was limited to directing Yeshiva to discharge personnel who failed to comply with the "Rules and Regulations of the Department of Hospitals and Hospital", or where the City determined that the employment of such personnel was not in the best interest of the City (236a)[2/].

2/ Aside from one affiliation contract (226a), plaintiff offered no testimony for the purpose of proving or disproving City control over Yeshiva personnel at Lincoln or the extent of the involvement between the City and Yeshiva at Lincoln.

Dr. Ira Lubell, a City employee, was Lincoln Hospital's administrator and was in charge of the hospital for the City (R.44,pp.190-191). Abraham Silverberg was the "Liaison Administrator" for Yeshiva at Lincoln Hospital. He administered the affiliation contract for Yeshiva and "was responsible for all of the activities of Albert Einstein at Lincoln Hospital" (R.44,pp.173-174). Silverberg described his role at Lincoln by simply stating that he "ran" that "part of Lincoln Hospital which was part of Albert Einstein" (199a). Although he deferred to Dr. Lubell in matters of patient care, Silverberg was generally recognized to have authority over Yeshiva personnel other than doctors at Lincoln Hospital (287a). Silverberg's authority included his power to hire or fire such Yeshiva personnel (198a).

Odessa Carrion was hired by Yeshiva to work at Lincoln Hospital in January of 1967 as a Social Work Supervisor of the out patient clinic in the Department of Social Service. At that time, the Director of Social Work was a Margaret Bernstein, an employee of Yeshiva who actually hired Mrs. Carrion (21a). At all relevant times, Odessa Carrion knew that Silverberg was Yeshiva's liaison administrator and representative at Lincoln Hospital (299a).

(b) Allegations of Failure to Award Position of Student Unit Supervisor.

Mr. Cagan was employed in 1967 by Yeshiva as well as New York University (hereafter "NYU") in the capacity of social worker and student unit supervisor of NYU social work students. In that position, Mr. Cagan was paid a salary of $9,500 by Yeshiva and $1,500 by NYU for his work with its students (288a) 3/.

In March, just two months after Mrs. Carrion was first employed by Yeshiva, she indicated to Mr. Cagan that she would like to become a student unit supervisor (288a). In April 1967, Mrs. Carrion sent a letter of inquiry to a Professor Leon of NYU who was then in charge of that University's program insofar as it pertained to hospital field work. She received a reply from Professor Leon sometime in May 1967 and shortly thereafter was interviewed by him (289a). However, Leon never offered to hire Mrs. Carrion for this position. In June 1967, rumors were confirmed that Margaret Bernstein, the Director of Social

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3/ Raymond Cagan died subsequent to the events at Bar, in 1971 (138a). His testimony before the City Commission on Human Rights was placed in evidence by the plaintiff-appellant.

Work would leave and Mr. Cagan would be promoted to her position, leaving vacant his former job of student unit supervisor (289a).

Mrs. Carrion again spoke to Mr. Cagan about the possibility of obtaining his job. Mr. Cagan accurately informed Mrs. Carrion that the position would only pay $9,500 as NYU would no longer supplement the salary of the student unit supervisor (289a-290a). Mrs. Carrion, then receiving $11,000, indicated that she was unprepared to take a decrease in salary (165a). Indeed, an unpleasant scene arose between them, wherein Mrs. Carrion informed Cagan that she thought her qualifications were better than Cagan's and she did not see why she could not receive $11,000 (13a,82a,289a,290a). Mrs. Carrion became angry and walked out of the meeting (139a-140a). Eventually in August 1967, Miss Avis Crocker was hired to fill the position. Miss Crocker, a Caucasian, was hired at a salary of $10,500, or $500 less than the salary that Mrs. Carrion was then making (290a) [4/]. Miss Crocker, like Mrs.

4/ Miss Crocker was interviewed in July 1967 and was informed like Mrs. Carrion that the position paid $9,500. However, Crocker was hired in "the last ten days" of August 1967. Cagan was advised that an extra $1,000 would be available at or about the time Crocker was hired (170a).

Carrion, held a Master in Social Work ("MSW") Degree and was a social work supervisor (290a). She had worked at Lincoln Hospital for at least one year more than Mrs. Carrion.

Of critical importance, Mr. Cagan testified that he had selected Miss Crocker as he had personally known and respected her work. He knew that she had satisfactorily participated in the field work supervision of other social work students a year before, and was deemed qualified and acceptable by NYU (176a,177a,179a and 290a). Cagan also testified that he was aware of derogatory comments in Miss Crocker's file but discounted them as he believed that they were caused by a personal dispute between Miss Crocker and her supervisor (177a).

Cagan testified further that he was unfamiliar with Mrs. Carrion's work because he had only "very superficial" contact with her (177a). Moreover, Cagan believed that Mrs. Carrion would not submit to a decrease in salary and was aware that Mrs. Carrion was looking for jobs in other institutions at that time (165a,291a). After Mrs. Carrion learned that Miss Crocker had been selected, she, without discussing her views with Cagan or anyone else, filed a complaint with the Commission on Human Rights of the City of New York (hereafter "Commission") alleging that she was

a Negro and that Miss Crocker's employment as a student unit supervisor was a discriminatory and unlawful act under the Administrative Code of the City of New York (291a).

It is conceded by Yeshiva that Mrs. Crocker did not turn out to be a satisfactory employee. The District Court found that her selection for the Student Unit Supervisor's position was not motivated by a racial animus (291a).

(c) Allegations of Discrimination for Unit Supervisor of Group Work.

The underlying events of the second alleged discriminatory act took place in the Summer of 1967 and were based upon the availability of another Student Unit Supervisor's position, this time in "group work". This second position was made known to employees at Lincoln Hospital, including Mrs. Carrion, by the circulation of a memorandum indicating the availability of that position and requesting interested people to contact Cagan (171a). At the trial of this matter, Mrs. Carrion testified that she had informed Cagan that she wanted the job (37a). However, Cagan stated that she never applied for the job, and he was unaware of her interest (167a,172a). Mrs. Carrion's previous testimony before the Commission clearly demonstrated that she

never told Cagan about her supposed interest in the second job. Mrs. Carrion testified before the Commission that after receiving the memo:

> "I waited to see if I was going to be consulted about this, because I had qualifications in group work as well as in community organization, as well as in psychotherapy.
>
> So I waited to see if I were going to be approached about this; and I was not.
>
> Then I came down and I filed another statement [with the Commission]". (292a)

The Court found that Mrs. Carrion's trial testimony with respect to the second position was untruthful (131a, 291a, 292a)[5/].

The second position was filled by a Professor Levy, a Caucasian, at a salary of $11,000 and Mrs. Carrion's complaint before the Commission was eventually amended accordingly

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5/ Indeed, the following colloquy between the Court and plaintiff's counsel indicates the Court's utter disbelief in plaintiff's position:

> "THE COURT: All right, but he [Cagan] says he didn't know. She sees him every day and doesn't tell him she wants it. The fact that they were co-workers merely highlights the idiocy of what seems to be your position. She sees this man every day and never mentions the fact that she wants the job because she wants to find out whether he is going to come to her. She is trying to make a case, that is what she
> (footnote continued on next page)

(292a). According to Mrs. Carrion, Levy was a boyhood friend of Mr. Cagan (39a). There was no evidence introduced to indicate that Levy was less qualified than Mrs. Carrion.

(d) Allegations of Failure to Award Directorship at Neighborhood Maternity Center.

In December of 1967, Mrs. Carrion, not having worked a full year in Yeshiva's employ, was still making $11,000 in her supervisory position (293a). At that time, Mrs. Carrion became aware that a position in Yeshiva's Neighborhood Maternity Center[6/] would become vacant as its incumbent was planning to leave (293a). Mrs. Carrion did apply for this

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footnote 5/continued

is trying to do. She doesn't want the job.

MR. GRAY: Your Honor, she would have to be informed about the job prior to --

THE COURT: She knew about the job. And she deliberately kept her mouth shut trying to make a case. That is all she was trying to do. She didn't want the job; and you waste the federal court's time with this kind of stuff.

What conceivably prima facie case have you made out?" (R.44,p.263)

6/ The Neighborhood Maternity Center is a satellite of Lincoln Hospital furnishing maternity care to the community (40a).

position and, in fact, held salary negotiations with Abraham Silverberg, the Liaison Administrator and attempted to obtain a salary in excess of $12,500 (41a).

Dr. Joseph J. Smith, an employee of Yeshiva ran the Neighborhood Maternity Center (R.44,pp.147-150). Dr. Smith did interview Mrs. Carrion for the position; however, at that time, Smith considered a Mrs. DeMorrisey the "front runner" (R.44,p.153).

The only evidence that could possibly support an allegation of racial discrimination was Mrs. Carrion's testimony that Dr. Smith stated "The Einstein people are very angry because you filed charges of discrimination against them, and this is going to have to be cleared up before we will give you the position" (47a). However, Dr. Smith testified that he was unaware of Mrs. Carrion's complaint filed with the Commission at the time he interviewed her and specifically denied making the statements ascribed to him by Mrs. Carrion (R.44,p.155). The Court found Mrs. Carrion's testimony on this point to be untruthful and found Dr. Smith's testimony to be truthful and credible (136a,301a,302a).

The incumbent, Miss Evelyn Crump, whose position Mrs. Carrion sought, was a Black woman (293a). Mrs. DeMorrisey who eventually was awarded that position was also a Black woman, and in addition was a social worker holding an MSW Degree who, in the opinion of Dr. Smith, was well qualified for the position by virtue of her extensive experience as a social worker and administrator (293a). The District Court specifically found that Dr. Smith's selection of Mrs. DeMorrisey over Mrs. Carrion was based exclusively on his evaluation of their relative fitness for the job (294a).

(e) Suspension and Discharge.

The remaining alleged acts of discrimination are the suspension and discharge of Mrs. Carrion at the end of October 1969 [7/].

7/ A hearing before the Commission had commenced on Mrs. Carrion's complaints on April 29, 1969 and had continued on May 14 and then adjourned after the complainant had completed her case on June 23, 1969.

Mrs. Carrion, undoubtedly feeling that she was now in the driver's seat delivered a letter dated June 22, 1969 to the AECOM Administration demanding that "in lieu of taking legal action" that she (a) be appointed to the faculty of AECOM, (b) that she be given a $2,000 increase in salary, retroactive to July 1, 1968, and (c) that she be awarded the title of Assistant Director of Social Service (294a).

At the end of September 1969, Raymond Cagan, then the Director of the Social Service Department, left for a month vacation. During Cagan's absence, Mrs. Carrion embarked on a course of conduct that was designed to bring about Cagan's dismissal from his job (294a).

Carrion's scheme was to have others accuse Cagan of sexually molesting female employees at Lincoln. Thus, on or about September 25, 1969, Mrs. Carrion attempted to coerce an employee at Lincoln Hospital, Shirley Sanchez, into signing a statement that she, Sanchez, had been sexually approached by Mr. Cagan in the Spring of 1968 (a year and a half prior to Mr. Cagan's vacation) (295a). Miss Sanchez refused to sign the statement prepared by Mrs. Carrion (295a)[8/].

According to Mrs. Carrion, this incident with Miss Sanchez resulted in her involvement in a "controversy" in the social work department at Lincoln (58a). During direct examination, Mrs. Carrion describing her involvement in this controversy, testified that she found out about Cagan's sexual advances because "there was some whispering around the social work department in regards to Kagan's activities with

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8/ Mrs. Carrion testified at trial that she had not attempted to coerce Miss Sanchez into signing the statement. However, her testimony was unbelievable and was clearly contradicted in part by one of her own witnesses (R.44,pp.240-241).

the secretaries, and it had to do with his attempting to put his hand under one of their dresses ...."(58a). Mrs. Carrion indicated that she sent for Miss Sanchez (59a) and further testified:

> "'[Shirley Sanchez] came to see me along with Mrs. Vazquez. Shirley Sanchez repeated the statement that Mr. Kagan had made these passes, that he had attempted to put his hand under her dress.'"

Thus, Mrs. Carrion maintained that she had voluntarily obtained an accurate statement from Miss Sanchez. On cross-examination, Mrs. Carrion identified the statement or memorandum that Miss Sanchez was supposed to have signed, and in an apparent attempt to bolster her testimony, Mrs. Carrion contended that the statement had been freely dictated to her secretary by Miss Sanchez (92a). However, Mrs. Carrion later admitted that she, and not Sanchez had actually dictated the statement (93a). Nevertheless, Mrs. Carrion steadfastly maintained that the statement or memorandum reflected an accurate description of the facts and that the memorandum had been prepared in 1969.

An examination of that memorandum reflects that "[i]n the Spring of 1968" Mrs. Carrion learned that", Mr. Cagan had made sexually charged overtures to Miss Shirley Sanchez ...." This memorandum further reflects that Mrs. Carrion waited until September 25, 1969 and then "sent for Miss Sanchez

and asked her about this." On the same day Carrion "took Miss Sanchez into Dr. Lubell's office where she repeated this story" (280a).

Thereafter the memorandum recites,

> "Miss Sanchez stated that one morning in the Spring of 1968 when she was alone in the office, Mr. Cagan approached her and remarked that she was probably having sex with boys, because she was old enough to. Miss Sanchez replied that she was shocked that he would approach her in this manner. She continued that a few days later he encountered her again and stated 'Boy, wait until I get you, in bed and made sounds with his mouth.' Miss Sanchez replied, 'You had better stop approaching me like this or I am going to report you.'" (280a)

Mrs. Carrion never explained the inconsistencies between her direct testimony and the contents of the 1969 statement or memorandum supposedly given by Miss Sanchez.

Mrs. Carrion testified that she learned that a union representative named Paula Ricardo was circulating her own memorandum amongst the social workers charging her with unethical and unprofessional conduct soon after the Sanchez incident took place (62a). Mrs. Carrion stated that she confronted the union representative but could not obtain a satisfactory answer because she believed "the social work department [was] involved in this conspiracy wasting the City and College time with this kind of thing and neglecting patients" (64a). Mrs. Carrion stated that a hearing was held

and "[a]ll of the people who were involved were called in on it" (65a). At that hearing, she was informed that Miss Sanchez had complained to a member of the department that she, Mrs. Carrion, was attempting to "blacken Mr. Kagan's name", (65a) and that she was charged with circulating things about Cagan "that are terrible" (65a). According to Mrs. Carrion the hearing held in early October did not resolve the controversy (65a,66a) and because of this apparent impasse, the acting director of the social work department[9/] sent the other parties at the hearing to Abraham Silverberg (65a,66a).

The record indicates that the "hearing" referred to by Mrs. Carrion was a confrontation between Mrs. Carrion and other employees in the social work department, who had found out about Mrs. Carrion's attempts to discredit her superior during his absence (278a,279a).

Mrs. Carrion was aware that prior to this hearing her fellow social workers objected to her conduct and were circulating a memo condemning that conduct (62a-64a). In this regard, Mrs. Carrion was correct for her fellow social work supervisors had, on October 1, 1969, sent their own memo to Dr. Lubell and Abraham Silverberg:

9/ A Black woman named Carrie Miller who Mrs. Carrion attempted to characterize as unqualified to be an acting director (70a,71a).

> "We are shocked and appalled by the content of the accusations and the manner in which they are being used. To accuse anyone in his absence without providing him an opportunity to defend himself is not only a violation of the code of ethics of our profession, but personally unacceptable to us." (278a)

However, this memorandum apparently did not obtain the results desired by Mrs. Carrion's peers, and two days later another memo was sent to Lubell and Silverberg:

> "...Much as we would like to consider the matter dropped as you said it was, apparently Mrs. Carrion has not accepted this. In view of the fact that this matter does not only affect Mr. Cagan adversely but the Social Service Department as a whole, we feel that some action should be taken.
>
> In addition Miss Sanchez has requested that the Social Service Supervisory Staff protect her from harassment by Mrs. Carrion who is trying to force her to sign the statement." [Exhibit I, 279a-280a]

The situation at Lincoln continued to deteriorate, and shortly after October 8, 1969, Silverberg received a petition signed by members of the Social Service Department requesting the "immediate dismissal of Mrs. Odessa Carrion, Supervisor in the Social Service Department as we can no longer work with her." (281a,295a).

Despite the hearing in which Mrs. Carrion participated, her activities apparently continued unabated for, on or about October 22, 1969, Silverberg received another threatening memorandum from Mrs. Carrion's peers:

> "In view of Mrs. Carrion's history of reprehensible behavior both as an individual and as a professional ... we, the undersigned feel that we can no longer work with her. We request that her employment be terminated immediately. If this is not done we will take appropriate actions." (284a)

Silverberg was now under siege, and as he recalled the situation:

> "...I had a number of groups coming in to me all from Social Service .... They came in to tell me that Mrs. Carrion was maligning Mr. Cagan and asking people to talk against him. One group was a City group ... They objected that she was intimidating one of the girls and trying to tell the girl to say that she had done something with Mr. Cagan.
>
> One of the groups of her peers said that she was not acting in the way a social service worker should act and that they did not want her to remain anymore." (202a-203a)

Silverberg summarized the threats of the various groups that visited his office:

> "These people told me in essence that if I did not do something about taking Mrs. Carrion out of there, there was going to be a job action." (113a)

On or about October 22, 1969, Silverberg received a memorandum from Stanley Shulman, Lincoln Hospital's Assistant Administrator in charge of the City's Labor Relations at the hospital (114a,283a,296a,297a). That memorandum reflected that Miss Kathleen Cullen, another City employee at Lincoln Hospital had filed a grievance under the City's Personnel Procedures in connection with Mrs. Carrion's

activities. That grievance was heard on October 21, 1969 by Shulman. Shulman's memorandum to Silverberg indicated that Shulman had conducted a City grievance and it recited that the "facts of the hearing revealed" that Mrs. Carrion attempted to coerce Miss Cullen into signing a statement "bearing allegations against the Director of Social Service which the grievant knew to be false" (296a). The memorandum recited other coercive activity against City employees by Mrs. Carrion in her attempts to discredit the vacationing Cagan. The Shulman memorandum observed:

> "[T]hat whatever allegations were made by Mrs. Carrion, allegedly took place more than a year and half ago. This fact itself raises the suspicion that Mrs. Carrion is being motivated purely by personal animosity." (297a).

Shulman's memorandum reflected the City's inability to effect Mrs. Carrion's discharge because she was not a City employee. Thus, Shulman's memorandum to Silverberg concludes,

> "I think you will agree that we cannot permit any individual who has caused such destruction and such anxiety among our employees, after we have spent years trying to promote harmonious inter-relationship to remain here. The facts being what they are, and although being without official power under the contract, I respectfully suggest that Mrs. Carrion is unfit to work here." (emphasis supplied) (297a)

Thereafter, representatives of Local 1199, of the Drug and Hospital Workers Union, which represented Yeshiva's employees at Lincoln Hospital as well as representatives from District Council 37, which union represented City employees at Lincoln Hospital, visited Silverberg (297a), demanded Carrion's

discharge and threatened a work stoppage (118a-121a). Silverberg believed he was faced with a "wildcat" work stoppage and an emotionally charged situation. He was concerned that the threatened job action would interfere with patient care at Lincoln (298a). Accordingly, Silverberg finally took action which he thought would "cool" the threat of a work stoppage (192a,298a). On October 28, 1969, he suspended Mrs. Carrion with pay (298a). Silverberg informed Carrion that her suspension would not be longer than three weeks pending an investigation of charges against her (298a-299a). His memorandum of October 28, 1969 to Carrion was explicit:

> "This is to inform you that you are suspended, with pay, effective immediately, pending investigation.
>
> For your information, a number of Social Service staff has insisted that your employment with the College of Medicine be terminated, on the ground that certain of your acts have been unprofessional and have tended to disrupt the effective functioning of the Social Service Department and the activities of the affiliation at Lincoln Hospital.
>
> Your suspension will be for no longer than three (3) weeks, during which time you are requested to absent yourself from your duties and from the Social Service Department. This will give the Administration an opportunity to make full investigation of the circumstances. You may be requested to appear for investgatory conferences." (298a-299a)

Mrs. Carrion received the Silverberg letter on October 28, 1969 and at that time she knew that she was a Yeshiva employee and she knew that Abraham Silverberg was Yeshiva's

representative at Lincoln Hospital (299a). However, Mrs. Carrion refused to absent herself from Lincoln Hospital and remained there until October 31, 1969 (299a). Other than her refusal to obey the suspension order, her only other action was, on the next day, to send a letter to Dr. Ira Lubell. She also sent a carbon copy of that letter to others including Silverberg. The text of that letter follows:

> "This is to bring to your attention the statement informing me that I was being suspended for 3 weeks signed by Mr. Abraham Silverberg without giving me a hearing or spelling out specific charges against me.
>
> As the liaison officer, Mr. Silverberg does not have the authority to take this action as well as no basis on which to base such a suspension. This action represents a violation of his own position and abusing his own authority. The ludicrous basis which he is using is based on a petition where I had no hearing and on rumored hearings at which I was not present. This kind of action demonstrates his abuse of authority as well as his irregular behavior. I am requesting clarification of this matter as well as the charges I placed against the workers in Social Service. I gave you a copy of the letter document on 10/23/69.
>
> I am requesting that proper action be taken against Mr. Silverberg for his reckless intrusion into the affairs of the Social Service Dept., in order to cause damage to me as a result.
>
> I will continue to service my patients from the 17 clinics which my unit covers as they would suffer severely in my absence. There is no worker in my unit qualified or trained to take over this complicated and

demanding service."
(153a,299a,300a)

Mr. Silverberg, after receiving Mrs. Carrion's letter of October 29, 1969, and aware that Mrs. Carrion had refused to obey his suspension letter, consulted with counsel and on October 31, 1969, acting for Yeshiva, discharged Mrs. Carrion for insubordination (300a).

Silverberg's explanation for her discharge was concise:

> "I had previously asked her to stay away from work for up to three weeks with pay so that we could keep this thing cool and not start any problems.
>
> She said that she would not listen to me and that I was not her boss, and so I fired her for insubordination."
> (192a)

(f) City and State Proceedings.

The Commission began to hear Mrs. Carrion's first three complaints before two lay commissioners on April 29, 1969. The hearing continued on May 14 and then adjourned on June 23, 1969 when Mrs. Carrion rested and her case against NYU was dismissed. After Mrs. Carrion was discharged she amended her complaint include the acts of suspension and discharge.

When the Commission reconvened in November 1969, it heard evidence on these acts and in early January 1970 ordered that

Mrs. Carrion be temporarily reinstated with back pay. Thereafter, it found that Mrs. Carrion had been discriminated against because of her color with regard to Yeshiva's denial of the two student unit supervisor's positions and her subsequent discharge. However, the Commission found that Mrs. Carrion had not been discriminated against with respect to the Neighborhood Maternity Center position.

The Commission's decision was reversed by the Supreme Court of the State of New York on August 3, 1970[10/]. Mr. Justice Dollinger found that the findings by the Commission were not supported by substantial evidence and that "substantial evidence established that ... [Mrs. Carrion's] unjustified insubordination resulted in her discharge". Mr. Justice Dollinger also found that in addition to the Commission's determinations not being supported by substantial evidence, "Petitioner [Yeshiva] was denied the essential element of fair play required in every administative proceeding". Although Mrs. Carrion claims that she was unaware of this Article 78 Proceeding in the New York Supreme Court, she was quite aware of the reversal and indicated that a demonstration took place at the Corporation Counsel's Office, the purpose of which was to insist "That Mr. Rankin make that appeal." (74a). The Appellate Division unanimously affirmed Mr. Justice Dollinger's

10/ Yeshiva University v. Commission on Human Rights of the City of New York, Index No. 6224/1970 (Sup.Ct. Bronx Co. August 3, 1970)

decision on February 18, 1971 (R.25,p.3). Thereafter, the Corporation Counsel moved the Court of Appeals for leave to appeal. The Court of Appeals denied the City's motion on May 31, 1971 (R.25,p.3).

On June 4, 1971, following the reversal and annulment of the Commission's order, Mrs. Carrion was discharged by Yeshiva (301a).

Mrs. Carrion indicated that she had no difficulty in obtaining a new position (77a) and in October 1971 was employed as the Director of Social Work for the Health and Hospitals Corporation of the City of New York (78a) at a salary considerably higher than her Yeshiva salary.

(g) The District Court's Decision

On October 5, 1967, Mrs. Carrion filed a complaint with the Equal Employment Opportunity Commission. On June 9, 1971, that Commission notified her that she was entitled to institute this action within thirty days (10a).

This case was commenced on or about July 6, 1971 against New York and Yeshiva Universities.

This action was set down for trial at the beginning of May [11/] but upon the application of plaintiff's then counsel it was adjourned to May 21, 1975 when a bench trial before Judge Knapp commenced.

11/ As previously indicated, plaintiff agreed to a voluntary dismissal of NYU on the eve of trial.

At the conclusion of plaintiff's case, the Court dismissed her complaint (131a). The Court made the following findings with respect to the first two alleged acts:

> "As to the first claim,... I find as a fact that Mr. Cagan gave the job to Mrs. Crocker solely and exclusively because he in good faith believed Mrs. Crocker to be better qualified, which evaluation he subsequently revised, but at the time he gave it, that was his belief.
>
> As to the second, I find, accepting Mrs. Carrion's testimony before the Human Rights Commission that she deliberately refrained from communicating her desire for that job to anyone, and accepting Mr. Cagan's testimony he did not know she was desirous of that job, there was therefore no discrimination on that one." (131a)

The Court found that Dr. Smith hired Mrs. DeMorrisey for the Neighborhood Maternity position "solely because of her qualifications and that he was wholly unaware of any previous complaint that Mrs. Carrion had made" against Yeshiva (136a).

Judge Knapp found it was not necessary for him to determine whether Mrs. Carrion's suspension and subsequent discharge constituted state action. The Court reasoned:

> "On the evidence before me, according to the testimony of Mr. Silverberg, which I credit, and noting that it was confirmed in essence in a very material way by Mr. Walker, whom I asked I find that Mr. Silverberg was confronted with a situation where he in good faith believed a strike was imminent.... (131a-132a)

> I find that Mr. Silverberg was confronted with this situation where he honestly believed that a strike might be imminent. And strikes in hospitals are not agreeable things. ... Mr. Silverberg honestly believed that he was confronted with a situation where, if he did not move Mrs. Carrion out at least until Mr. Cagan could get back and straighten out the thing, he would be confronted with a strike. He therefore sent her a notice of suspension at full pay." (132a)

The Court found that Mrs. Carrion elected to ignore Silverberg's "lawful command, and instead sent him an insulting letter" (133a). Judge Knapp then carefully explained why there was no need for a hearing or further investigation:

> "I find as a matter of law, without in any way threatening any remuneration to which she might be entitled in the situation with which he was confronted, it was perfectly reasonable for him to ask her to stay away. She deliberately refused to follow that direction and instead sent insulting letters or an insulting letter. I find that, confronted with that situation, Mr. Silverberg reasonably concluded that no further investigation would be fruitful, and fired her.
>
> Among the things she did was showed up contrary to his instructions, which instructions were given in view of what he considered to be a threat of a strike.
>
> In those circumstances I think it was within his competency to decide that further investigation would be fruitless, he fired her for insubordination, which needed no hearing to be established." (133a-134a)

Subsequently, both parties submitted extensive proposed findings of fact and conclusions of law. The Court, in a memorandum and order dated July 28, 1975, adopted, with certain modifications, the submission of the defendant and stated that

"[s]uch Findings and Conclusions shall be deemed supplemental to those made on the record in open court at the close of plaintiff's case." (285). These supplemental findings are referred to throughout this brief.

(h) Award of Counsel Fees.

On June 13, 1975, Yeshiva moved pursuant to Section 706(k) of the Civil Rights Act of 1964, (hereafter the "Act"), Title 42, United States Code § 2000e-5(k) and Rule 54(d) of the Federal Rules of Civil Procedure for the imposition of attorney's fees and discretionary costs (305a-315a).

Judge Knapp, on July 28, 1975, awarded counsel fees in the amount of $5,000, and certain discretionary costs.

This appeal followed.

RELEVANT STATUTES

1. The Civil Rights Act of 1871, 17 Stat. 13, Title 42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Section 703(a) of the Civil Rights Act of 1964, Title 42 U.S.C. §2000e-2(a)

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. Section 706(k) of the Civil Rights Act of 1964, Title 42 U.S.C. §2000e-5(k)

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SUMMARY OF ARGUMENT

The District Court's findings that Mrs. Carrion's case consisted of an "unmitigated tissue of lies" and was a "vexatious" lawsuit provided a more than ample basis for its exercise of discretionary authority in taxing attorney's fees against the plaintiff. United States Steel Corp. v. United States, 385 F. Supp. 346 (W.D.Pa.1974) aff'd, 519 F.2d 359 (3rd Cir.1975).

The District Court was correct in not reaching the issue of "state action" because Carrion's discharge for insubordination did not deprive her of liberty or property, Board of Regents of State Colleges v. Roth, 408 U.S.564 (1972), and the fact that she was insubordinate was not in dispute, Mills v. Richardson, 464 F. 2d 995 (2d Cir.1972). However, a review of the record indicates that Yeshiva's dismissal of Carrion did not involve "state action", Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

The District Court specifically found that Yeshiva had not discriminated against Mrs. Carrion because of her race, and those findings are certainly not clearly erroneous. The District Court did not abuse its authority by declining to adjourn the trial to await a witness dismissed by plaintiff since the testimony of that witness could not affect the outcome of the trial. Payne v. Capital Transit Co., 181 F.2d 613 (D.C. Cir. 1950).

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETIONARY AUTHORITY IN AWARDING ATTORNEY'S FEES AFTER PLAINTIFF'S VEXATIOUS LAWSUIT WAS DISMISSED

Subsequent to the dismissal of the Complaint, Yeshiva moved the District Court for the imposition of attorney's fees to be taxed as a cost payable by the plaintiff pursuant to Section 706(k) of the Act (305a-315a)[12/]. That section provides that a court "in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs...." In a memorandum opinion dated July 28, 1975, the District Court granted the motion and awarded $5,000 as an attorney's fee (317a-318a). This award was based on a finding that Mrs. Carrion's testimony was a "tissue of lies" and that the lawsuit was "vexatious". Accordingly, the award was an appropriate exercise of the Court's discretionary authority in furtherance of an important Congressional policy.

12/ Yeshiva also moved the court for certain discretionary costs pursuant to Rule 54(d), Federal Rules of Civil Procedure. Certain of the discretionary costs were allowed and a provision was made for the allowance of the costs of the trial transcript if an appeal was taken (318a).

The imposition of these costs is not contested on appeal, but out of an abundance of caution, we note that such costs rest within the discretion of the Trial Court and that the exercise of discretion should not normally be set aside. Bern v. British Commonwealth Pac. Airlines Ltd., 362 F.2d 799 (2d Cir.), cert. denied, 385 U.S. 948 (1966).

(a) Standard For Awarding Attorney's Fees

Mrs. Carrion emphasizes the "private Attorney General" rationale for Section 706(k) of the Act (Appellant's Brief at 16), and Yeshiva recognizes that Congress intended that section to be a method to compensate such private Attorneys General. Newman v. Piggy Park Enterprises, Inc., 390 U.S. 400, 402 (1968)[13/]. However, the "private Attorney General" theory is not the only rationale underlying Section 706(k). The District Judge in United States Steel Corp. v. United States, 385 F.Supp. 346 (W.D. Pa. 1974), aff'd, 519 F.2d 359 (3rd Cir. 1975), reviewed the legislative history of Section 706(k) and found that its plain language embodies two important Congressional concerns; the encouragement of the vindication of minority groups' rights and the protection of potential defendants from frivolous lawsuits. Thus, the court stated:

> "[S]ection 706(k) of Title VII of the Civil Rights Act of 1964 emerged as an accomodation between two congressional concerns. The first, the inability of low income minorities to bear the financial burden of attorney's fees in vindicating their Civil Rights; and, secondly, the award of attorney fees to those parties who must defend against unreasonable, frivolous, meritless or vexatious actions brought by either private parties or the government." United

13/ Newman involved violations of Title II of the Civil Rights Act, 42 U.S.C. §2000a et seq., which deals with discrimination in public accomodations. However, authority regarding Title II's provision for attorney's fees are applicable in Title VII cases.

States Steel, supra at 348 (Emphasis added). 14/

Thus, while the defendant does not act like a "private Attorney General" in a Title VII case, a prevailing defendant is certainly entitled to recover a reasonable attorney's fee when required to defend against a frivolous or factually baseless action, Lee v. Chesapeake & Ohio Ry., 389 F.Supp. 84 (D. Md. 1975), or an action which is "unreasonably brought", Paddison v. Fidelity Bank, 60 F.R.D. 695 (E.D. Pa. 1973), "vexatious or prosecuted on highly questionable grounds", Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974) 15/, or the result of improper conduct of the plaintiff, United States Steel Corp. v. United States, 519 F.2d 359 (3rd Cir. 1975).

Yeshiva conceded, and the District Court observed, that "discretion should be sparingly exercised in awarding attorney's fees and taxing costs against a Title VII plaintiff...." However, the District Court held "this case represents an occasion for the exercise of such discretion" (317a). Judge Knapp was specific in stating why this case warranted such an exercise of his discretion:

14/ The language of Section 706(k), of course, does not limit the availability of counsel fees to prevailing plaintiffs, and in the Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Court explicitly recognized the availability of counsel fees for prevailing defendants.

15/ This 9th Circuit criterion appears in the court's unpublished order denying rehearing en banc filed November 6, 1974, according to Footnote 23 in United States Steel Corp. v. United States, supra, 385 F.Supp. at 364.

> "After a two day bench trial, I concluded that [Mrs. Carrion's] testimony constituted an unmitigated tissue of lies; that no one had discriminated against her; and that the reason she was fired was that she had engaged in deliberately disruptive conduct having nothing to do with the exercise of any constitutional or statutory right (but was motivated solely by spleen) and because she had defied reasonable attempts to control her activities. In the circumstances, I see no reason why Yeshiva University should be compelled to divert its funds to the defense of this vexatious lawsuit." [Footnote and citation omitted] (317a-318a).

The District Court opinion clearly reflects that Judge Knapp applied the correct standard of law to Yeshiva's motion for attorney's fees. Thus the Court specifically referred to Newman v. Piggy Park Enterprises, Inc., supra, and United States Steel Corp. v. United States, supra. Indeed, appellant does not take issue with the standard applied by the District Court, but actually quarrels with the application of that standard to the facts at bar. This position, we submit, places an insurmountable hurdle in the path of the appellant because it is well established that the taxing of attorney's fees lies within the sound discretion of the Trial Court. United States Steel Corp. v. United States, supra, 519 F.2d 359 (3rd Cir. 1975); Sprogis v. United Airlines, Inc., 517 F.2d 387 (7th Cir. 1975); Evans v. Sheraton Park Hotel, 513 F.2d 177 (D.C. Cir. 1974); Palmer v. National Cash Register Co., 503 F.2d 275 (6th Cir. 1974); Waters v. Wisconsin Steel Works of International Harvester

Co., 502 F.2d 1309 (7th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). On this record there can be no showing of an abuse of the Trial Court's discretionary authority[16/].

(b) Evidence of Bad Faith and Lack of Merit

Mrs. Carrion's bad faith, wrongful conduct, and the action's lack of merit are demonstrated by the District Court's specific findings that Mrs. Carrion's testimony constituted an "unmitigated tissue of lies" (318a) and that her testimony "was not credible and not believable as it related to the material allegations" (f.56, 301a)[17/], and that she had "deliberately perjured herself" (318a).

Appellant understandably treats these findings very gingerly, but on this record the Trial Court's conclusion that Mrs. Carrion was a liar cannot be set aside, absent unusual circumstances. Ruby v. American Airlines, 329 F.2d 11 (2d Cir. 1964), vacated as moot, 381 U.S. 277 (1965).

These findings are well supported by the record. Appellant's testimony at the trial consisted of obvious fabrications and half truths which evidenced her utter disregard for the truth. Mrs. Carrion's story about her

16/ Plaintiff may actually be contesting the Trial Court's findings of fact. However, as discussed at length in Point III, infra, the burden is again on the appellant to persuade the reviewing court that the findings were clearly erroneous, "for those findings come here well armed with the buckler and shield" of Rule 52(a) of the Federal Rules of Civil Procedure. Horton v. United States Steel Corp., 286 F.2d 710, 713 (5th Cir. 1961).

17/ References to the Findings of Fact of the District Court are hereinafter preceded by the letter "f".

conversation with Cagan regarding the first Student Unit Supervisor's job neglected to include the fact that, when told that the salary was only $9,500, she argued with him, indicated that she would not accept a cut in salary and stormed out of his office (139a-140a). Similarly, when testifying about the manner in which she purportedly applied for the second Student Supervisor position, Mrs. Carrion fabricated a conversation with Cagan wherein she told him of her interest in the position and received a half-hearted response (37a). However, on cross-examination, it became obvious that Mrs. Carrion never applied for the position. (See pages 11-12, supra). Her prior testimony before the Commission, indicating that she deliberately did not apply, was confirmed by the testimony of Raymond Cagan, which was introduced by Mrs. Carrion, and accepted by the Court as truthful (f.58, 302a).[18/]

Mrs. Carrion also completely fabricated the story that Dr. Smith told her that he could not consider her for the job as Director of Social Work at the Neighborhood Maternity Center because of the complaint she had pending with the Commission. Dr. Smith testified that he was, at that time, unaware that appellant had filed any charges (R.44, p.165). The Court found Dr. Smith to be a truthful witness (f.59, 302a).

18/ Appellant's contention, at page 49 of her Brief, that the Court's finding that she did not apply for this position was based only on Cagan's testimony, completely ignores Carrion's testimony. Moreover, any challenge to that particular finding must demonstrate that it was "clearly erroneous". See Point III, infra.

The record also demonstrates Mrs. Carrion's untruthfulness with respect to the manner in which she related the incidents which led to her suspension by Yeshiva. On direct examination (58a-65a), Mrs. Carrion concocted a history of events by which she attempted to persuade the Court that she was assisting in the investigation of a severe personnel problem at Lincoln Hospital which she had become aware of in the fall of 1969. Mrs. Carrion testified that she asked Miss Sanchez if she would be willing to put her complaint in writing and that Miss Sanchez replied that she would, and dictated the contents of a memo to a secretary. Mrs. Carrion continually emphasized that the memorandum was Miss Sanchez' statement (see, e.g., 61a).

On cross-examination, Mrs. Carrion identified the second page of defendant's Exhibit I as the statement that was typed. However, that exhibit was prepared for Mrs. Carrion's signature and not Miss Sanchez' signature. Moreover, the memorandum can in no way be read as Miss Sanchez' statement and Mrs. Carrion eventually admitted that the statement was hers. Moreover, it indicates that Mrs. Carrion learned of the purported acts in March 1968 but waited until September of 1969, when Cagan was on vacation (f.33, 294a), to do anything about this year-and-a-half-old incident. Nor has Mrs. Carrion ever explained the discrepancy between the description of the sexual acts in the 1969 memorandum and in her 1975 testimony (see pages 16-17 supra, 208a).

The Court properly characterized the circulation of the memorandum as part of "...a course of conduct that was designed to bring about [Mr. Cagan's] dismissal from his job upon his return from his vacation one month later" (f.34, 294a).

Moreover, this testimony reveals that Mrs. Carrion's suspension had absolutely nothing to do with her race, (f.49, 300a; f.51, 301a), but was based solely on her campaign to discredit Cagan, and the furor it caused at Lincoln Hospital (ff.36-42; 295a-298a). This invidious conduct with respect to her vacationing superior clearly demonstrated bad faith.

We submit that Mrs. Carrion's bad faith is also demonstrated by her deliberate insubordination and her meritricious attempts to justify her actions. Mrs. Carrion attempted to persuade the Court that her insistence upon staying at Lincoln and the insulting letter she sent to Dr. Lubell (153a) were due to her ignorance of Silverberg's position at Lincoln Hospital (54a)[19/].

Mrs. Carrion attempts to characterize her letter to Dr. Lubell as an inquiry into Silverberg's authority to suspend her (Appellant's Brief at 51). However, it was not an inquiry, it was a statement by Mrs. Carrion that Mr. Silverberg

19/ Mrs. Carrion testified that she telephoned an individual associated with The National Association of Social Workers after she received Silverberg's suspension order and was advised that only her immediate supervisor could suspend her (51a). This self-serving testimony was implausible and was correctly discounted by the Court.

"[did] not have the authority to take this action..." and "...[was] abusing his own authority..." (153a). The letter, of course, was not addressed to Silverberg directly; he only received a carbon copy (153a). The District Court correctly characterized the letter as "insulting" (133a).

Mrs. Carrion also tried to explain away her refusal to obey the suspension order by stating in her letter to Dr. Lubell:

> "I will continue to service my patients from the 17 clinics which my unit covers as they would suffer severely in my absence. There is no worker in my unit qualified or trained to take over this complicated and demanding service." (153a).

However, Mrs. Carrion testified that she had taken her usual vacation in the summer of 1969 (136a). Thus, it appears that her qualms about the ability of her staff to service her patients arose conveniently only at the time she was suspended.

The above overwhelmingly demonstrates that Mrs. Carrion's testimony did, indeed, constitute "an unmitigated tissue of lies" (317a), and is evidence of conduct that warrants the imposition of attorney's fees.

(c) Commission Decision Is Not Evidence of Good Faith

Appellant overlooks the unchallenged findings of the Trial Court and argues that this action was "in good faith due to the fact that she prevailed before the Commission" (Appellant's Brief at 19-21). This facile argument ignores

the fact that the Commission's determination was overturned by the New York State Supreme Court in a proceeding instituted by Yeshiva under the provisions of Article 78 of the Civil Practice Law and Rules[20/], on the grounds that the Commission's determination was not based upon substantial evidence. (See CPLR §7803.4).

Thus, the state court decision was not based upon an obscure technicality or upon a Justice's substitution of his judgment for the "expertise" of the Commission. It was based upon the fact that Mrs. Carrion was not even able to muster substantial evidence to support the Commission's determination. The state court's review of the Commission proceedings was, by statute, highly circumscribed and did not involve any determination with respect to the credibility of any witnesses. Yet, despite the state court's decision and appellate affirmance, Mrs. Carrion commenced the instant action, based upon the same insufficient evidence which was presented to the Commission, almost five years after the conclusion of the Commission's hearings.[21/] The evidence presented at the trial consisted of basically the same uncreditable testimony of Mrs. Carrion as was presented before the Commission. Thus, from its very inception in 1967, this case was motivated by Mrs. Carrion's

20/ CPLR §7801 et seq. (McKinney's 1963).

21/ Moreover, the Commission did not find that appellant had been discriminated against with respect to the denial of the position at the Neighborhood Maternity Center (f.50, 200a). Thus, the cloak of good faith alleged by this argument does not envelop this particular aspect of her claim.

spleen, not from a good faith attempt to vindicate her constitutional and statutory rights (318a).

(d) Provision of Free Counsel Does Not Demonstrate Good Faith

Appellant contends that her good faith is also demonstrated by the fact that she was, at both the Commission hearings and the trial before the District Court, represented by attorneys assigned by the National Association for the Advancement of Colored People and the Legal Defense and Education Fund (Appellant's Brief at 21).

This is a curious argument as the record would indicate that it is probable that these distinguished organizations were simply taken in by appellant's untruthfulness and could not prevent her from giving perjurious testimony.[22/] Certainly, the thrust of this argument cannot be that the good faith of counsel automatically cloaks the client with the same mantel. If there is any presumption it is that the bad faith of the client does not taint the counsel. In the instant case, the record demonstrates that trial counsel should not have pursued this case to trial. Whether that mistake was due to Mrs. Carrion's duplicity or an aspect of internal administration peculiar to these organizations is not developed in the record. However, the problem often experienced by eleemosynary organizations was recently discussed by Judge Weinstein in Maldonado v. Parasole, 66 F.R.D. 388 (E.D.N.Y. 1975).

22 It should be noted that neither of these organizations is prosecuting this appeal.

> "Counsel, because they serve without fee, are in the unenviable position of being manipulated by possibly vindictive clients who they cannot in good conscience abandon and who feel no economic pressure to come to a reasonable settlement." (Id. at 391).

Despite the absence of any new evidence in the case at bar, Mrs. Carrion disdained and spurned Yeshiva's reasonable settlement offers (309a), and persisted in burdening the District Court and Yeshiva with preparation and the trial herein.

(e) Reasonable Exercise of Discretion

After concluding that this case clearly warranted the exercise of its discretionary power to grant attorney's fees, the District Court looked to the factors relevant to the determination of the amount to be awarded (318a). See Johnson v. Georgia Highway Express Inc., supra. Yeshiva's affidavit supporting its motion for attorney's fees (305a-315a) set forth the relevant facts relating to these factors. Although the motion was opposed none of the facts in the affidavit were contested by plaintiff.

Yeshiva contended that in addition to Carrion's bad faith, it was a charitable educational institution and that the time and money that it has been forced to spend in defense could have been better spent in educating students (312a). In this regard, Yeshiva submitted that its actual expenditures for the defense of this action far exceeded the requested amount of $5,000 (310a). Moreover, the District Court noted, as did the court in Lee v. Chesapeake & Ohio Ry., supra, that appellant is able to bear the expense of her

misconduct in that she now earns approximately $25,000 per year, has no dependents and had not paid for any of her legal representation (318a).

Inasmuch as the sum awarded by the District Court was consistent with the factors before it, it was entirely proper and clearly not an abuse of discretion. Indeed, there could not be a clearer case for an award of counsel fees for a prevailing defendant in a Title VII case.

II.

THE TRIAL COURT CORRECTLY DETERMINED THAT YESHIVA'S TERMINATION OF PLAINTIFF'S EMPLOYMENT FOR UNDISPUTED INSUBORDINATION DID NOT ABRIDGE HER CONSTITUTIONAL RIGHTS

Odessa Carrion argues that the termination of her employment for insubordination without a hearing deprived her of due process of law under the Fourteenth Amendment to the Constitution.[23/] This argument failed in the Trial Court because plaintiff did not prove that she was deprived of liberty or property, or that there were disputed facts requiring a hearing. The Trial Court, given this failure of proof, found it unnecessary to reach the issue of whether Yeshiva's discharge of plaintiff constituted "state action" (131a-134a). However, a review of the record by this Court demonstrates that plaintiff also did not sustain her burden of proof on that issue.

23/ Plaintiff has apparently abandoned her claim, raised in the pre-trial order of January 8, 1975, that her suspension with pay abridged her constitutional rights.

(a) Plaintiff Was Not Deprived of an Interest In "Liberty" or "Property"

It is axiomatic that due process protections do not attach unless plaintiff proves that she was denied an interest in either liberty or property. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Thus, the Roth Court stated:

> "[T]o determine whether due process requirements apply in the first place, we must look... to the nature of the interest at stake [citation omitted]. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." 408 U.S. at 570-71 (emphasis in original).

Roth clearly establishes Mrs. Carrion's lack of an interest sufficient to invoke due process protections. She failed to prove that she had any expectation of continued employment or that a stigma attached to her discharge.

(1) No Interest In Property

Roth articulates the applicable test for determining the presence of a constitutionally recognized property interest.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

The non-tenured teacher in Roth had no independent non-subjective expectation and, therefore, had no constitutionally

cognizable property interest in continued employment. In contrast, the non-tenured teacher in Perry v. Sindermann, 408 U.S. 593 (1972), had an independent expectation because of the existencof a de facto system of tenure.

Mrs. Carrion failed to plead, argue or prove any independent expectation of continued employment. She pointed to no set of rules and regulations or practices of Yeshiva by which she could imply an actual or de facto rule of tenure. She pointed to no contract by which she was guaranteed continued employment until fired for cause.[24/] Appellant's sole argument, advanced for the first time in this Court, is that she was "hired for an indefinite period of time and had every expectation of retaining her employment for as long as she was satisfactorily performing her work" (Appellant's Brief at 43). It is exactly this type of unilateral and subjective expectation that the Supreme Court in Roth, and this Court in Russell v. Hodges,[25/] found incompatible with the existence of a constitutionally recognized property interest.

Mrs. Carrion's claim that her status as an employee at will, without more, devolved upon her a non-subjective expectation of continued employment was explicitly rejected by the Tenth Circuit in Abeyta v. Town of Taos, 499 F.2d 323

24/ Arnett v. Kennedy, 416 U.S. 134 (1974).

25/ 470 F.2d 212 (2d Cir. 1972).

(10th Cir. 1974), a case apparently overlooked by plaintiff. The logic of that Court is applicable to the facts of this case.

> "[T]he record does not disclose that appellants have any right to continued employment which could constitute a property interest. They operate under no contract or commission and have no fixed term of employment, and their employment must be considered terminable at will. [footnote omitted] At best, appellants have a mere unilateral expectation of continued employment. This is not a property right encompassing due process guarantees." 499 F.2d at 327.

See also McNeil v. Butz, 480 F.2d 314, 320-21 (4th Cir. 1973); Hirsch v. Green, 368 F.Supp. 1061, 1067 (D. Md. 1973); Bean v. Darr, 354 F.Supp. 1157, 1163 (M.D. N.C. 1973); Jones v. Kelly, 347 F.Supp. 1260, 1263 (E.D. Va. 1972).

The cases relied upon by Mrs. Carrion do not provide her any escape from these settled principles of law. In Goss v. Lopez, 419 U.S. 565 (1975), the suspended students had an expectation of continued education predicated upon state laws for compulsory education. 419 U.S. at 735-36. See Greenhill v. Bailey, 519 F.2d 5. 8 n.9 (8th Cir. 1975). In Commonwealth of Pennsylvania ex rel. Raferty v. Philadelphia Psychiatric Center, 356 F.Supp. 500 (E.D. Pa. 1973), plaintiff was fired from her position as a psychiatric nurse because of her exercise of First Amendment rights, a finding itself sufficient to void her termination.[26/] Powe v.

26/ Insofar as the District Court's opinion indicates that plaintiff's employment at will was sufficient to create an independent expectation of continued employment, it clashes with Roth and its progeny.

Charlotte Memorial Hospital Inc., 374 F.Supp. 1302 (W.D. N.C. 1974) is inapposite because the plaintiff doctor had an expectation of the continuation of staff privileges derived from the hospital's policy of renewing those privileges "as a routine matter". Id. at 1306.

Mrs. Carrion failed to present "a scintilla of evidence demonstrating the requisite mutually explicit understanding with [Yeshiva] which might have supported a claim of entitlement to [continued]...employment". McNeil v. Butz, supra at 321. Because of that total failure of proof the Trial Court correctly found that Mrs. Carrion was not deprived of any constitutionally protected interest in property.

(2) No Deprivation of Liberty

Plaintiff's proof is similarly deficient with respect to her claim that she was denied "liberty". Roth also sets forth the standard to determine whether the termination of employment constitutes a deprivation of liberty. The termination of employment, in and of itself, is not such a deprivation. There must be substantial injury, such as charges that "might seriously damage...standing and associations in [the] community", or the imposition of a "stigma or other disability" that would foreclose the freedom to take advantage of other employment opportunities". 408 U.S. at 573.

Mrs. Carrion pointedly failed to prove either of

these two types of "injury"[27/] to her liberty. The record does not contain a single iota of proof that plaintiff's "good name, reputation, honor or integrity" was impugned, or that Yeshiva's firing imposed upon her a "stigma or other disability". Roth, supra at 573.[28/] It is also clear that the mere termination of Mrs. Carrion's employment for insubordination did not act as a "stigmatization per se". Velger v. Cawley, 525 F.2d 334, 336 (2d Cir. 1975). Yeshiva did not charge Mrs. Carrion with "immorality, dishonesty or some serious personality defect or societally condemned status which is beyond [her power] to change". Calo v. Paine, supra at 1208. See also Russell v. Hodges, supra at 217.

This appeal should be governed by the logic of this Court in Simard v. Board of Education of Town of Groton, 473 F.2d 988 (2d Cir. 1973), where the non-renewal of a contract of a non-tenured teacher upon numerous grounds, including insubordination, was sustained against a due process challenge. Although the Court found it unnecessary to reach the question of whether a liberty interest was involved, it stated in a

27/ See Calo v. Paine, 385 F.Supp. 1198, 1204-08 (D. Conn. 1974).

28/ Mrs. Carrion claims that her "employment opportunities are seriously jeopardized" (Appellant's Brief at 42). That contention, raised for the first time on appeal, is bereft of support in the record and is difficult to take seriously in light of plaintiff's ability to secure more remunerative employment with the Health and Hospitals Corporation. Cf. Schwartz v. Thompson, 497 F.2d 430 (2d Cir. 1974).

footnote:

> "Given the Supreme Court's definition of those interests rising to the level of 'liberty,' we doubt that [plaintiff] is entitled to due process on this ground." 473 F.2d at 992 n.6.

If firing for insubordination and other grounds in Simard would not constitute a deprivation of liberty, then a fortiori Yeshiva's firing of Mrs. Carrion for only insubordination did not abridge her right to liberty. See also Gray v. Union County Intermediate Education District, 520 F.2d 803 (9th Cir. 1975) (charges including insubordination); Lake Michigan College Federation of Teachers v. Lake Michigan Community College, 518 F.2d 1091 (6th Cir. 1975) (violation of state law); Abeyta v. Town of Taos, supra (improper job performance and derilection of duty); Irby v. McGowan, 380 F.Supp. 1024 (S.D. Ala. 1974) ("non-cooperative").[29/]

The cases relied upon by Mrs. Carrion to show she was harmed are indicative of the type of serious charge, not present here, necessary to constitute a stigma of constitutional magnitude. The charge of "severe mental illness" in Velger v. Cawley, supra, and Lombard v. The Board of Education of the City of New York, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975), and of fraud in Rollins v. Civil Service Commission, 512 F.2d 1319 (D.C. Cir. 1975) and Huntley v. North Carolina State Board of Education, 48[illegible] F.2d

29/ Plaintiff also failed to prove that the reason for her termination of employment would be communicated to prospective employers. Velger v. Cawley, supra at 336; Brouillette v. Board of Directors of Merged Area IX, etc., 519 F.2d 126, 128 (8th Cir. 1975).

1016 (4th Cir. 1974) seriously stigmatize an individual and indicate an inability to perform virtually any job.

Mrs. Carrion's "liberty" argument really boils down to one simple contention: the mere termination of her employment, in and of itself, unconstitutionally stigmatized her. That argument is inconsistent with the logic of Roth and was flatly rejected by this Circuit in Russell v. Hodges, supra. As explained by the Ninth Circuit:

> "Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament or character. [citation omitted] But not every dismissal assumes a constitutional magnitude. The concern is only with the type of stigma that seriously damages an individual's ability to take advantage of other employment opportunities." Gray v. Union County Intermediate Education District, supra at 806.

It follows, under settled law, that Yeshiva did not abridge plaintiff's right to liberty by firing her for insubordination, and the Trial Court was correct in so holding.

(b) The Undisputed Fact That Plaintiff Was Fired For Insubordination Vitiated Any Need For A Hearing

The Trial Court found that Mrs. Carrion had deliberately refused to follow Mr. Silverberg's suspension directive, and instead "showed up [at work] contrary to his instructions" (133a). The Court concluded that:

> "In these circumstances I think it was within his [Silverberg's] competence to decide that further investigation would be fruitless, and he fired her for insubordination, which needed no hearing to be established." (134a).

That application of the law to the facts of this case was correct because it is only the presence of "adjudicative facts" which necessitate a hearing and the procedural rights ancillary thereto. Goldberg v. Kelly, 397 U.S. 254, 268 (1970). Cf. Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971).

There were no adjudicative facts to determine had Yeshiva held a hearing. Goldberg v. Kelly, supra at 269. Mrs. Carrion did not, and could not, dispute the finding of the Trial Court that she had "refused to absent herself from Lincoln Hospital" after receipt of the Silverberg directive (300a). Indeed, it is conceded (Appellant's Brief at 10). When there are no questions of fact, due process does not require a hearing. Mills v. Richardson, 464 F.2d 995, 1001 (2d Cir. 1972); Cf. McNeil v. Butz, supra at 326; Farrell v. Joel, 437 F.2d 160, 163 (2d Cir. 1971); Rumler v. Board of School Trustees For Lexington County Dist. No. 1 Schools, 327 F.Supp. 729, 743 (D.S.C. 1971).[30/]

Appellant has attempted to remedy this flaw by claiming that if given a hearing she would have presented witnesses concerning the so-called "protest" undertaken against her employment with the Health and Hospitals Corporation (Appel-

30/ Plaintiff's claim that she received inadequate notice of the reason for her termination is frivolous. Mrs. Carrion could have had no doubt that the insubordination referred to in the Silverberg's termination letter of October 31, 1969 stemmed from her refusal to comply with his prior suspension directive.

lant's Brief at 46). That claim is spurious for three reasons. First, that protest took place subsequent to the time any hearing would have been held; therefore, evidence of that protest would obviously have been unavailable. Second, the protest was completely irrelevant to the insubordination which was the reason for plaintiff's discharge. Third, plaintiff could not establish any nexus between the protest and Yeshiva (79a).

Mrs. Carrion cannot successfully argue that she was entitled to a hearing solely to present mitigating facts. That claim was given short shrift by the Fifth Circuit:

> "...[Plaintiff] seeks an Air Force hearing not to refute the charges but only to present mitigating considerations. That makes this a case in which appellant claims that constitutionally guaranteed liberty is infringed because the government is about to put the undenied truth in its own records. This need not long detain us." Sims v. Fox, 505 F.2d 857, 863 (5th Cir. 1974)(en banc), cert. denied, ___U.S. ___, 95 S.Ct. 2415 (1975). 31/

Moreover, the only possible mitigating factors were set forth in plaintiff's letter of October 29, 1969, and were known to Silverberg. Any further investigation by Silverberg would have been "fruitless" (134a). Thus, there were no mitigating facts to present.

Mrs. Carrion finds herself in an awkward position respecting her due process claim. At the time of the suspension notice, she was informed of an ongoing administrative investigation and of her probable participation therein. It

31/ See also Farrell v. Joel, supra at 163.

is clear, as held by the Trial Court (133a), that her suspension was accompanied by adequate procedural safeguards. At that point, however, Mrs. Carrion parted paths with fair and orderly administrative procedure and took matters into her own hands. The not surprising reaction of Yeshiva to her undisputed flouting of its reasonable and necessary suspension directive raised no questions of fact, and did not entitle her to a hearing.

(c) Yeshiva's Termination of Plaintiff's Employment Did Not Constitute State Action

Although the Trial Court found it unnecessary to reach the question of state action this Court, upon a review of the record, would find that Yeshiva's termination of Carrion's employment was not taken "under color" of law. We hasten to add that the absence of any abridgement of an interest in property or liberty or the existence of disputed facts makes such an appellate determination unnecessary.[32/]

Appellant would have this Court limit its inquiry to only two indicia of state action: the degree to which the state, here New York City, has become a "joint participant in the challenged activity" and the extent to which Yeshiva performs a "governmental" or "public" function (Appellant's Brief at 24-25). However, this Court has recognized that a "consideration of whether there is state action necessarily

32/ This Court has the ability to determine this question for the first time on appeal. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

entails a balancing process" of five factors:

> "(1) The degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of [any] governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity...; (4) the extent to which the organization serves a public function...; (5) whether the organization has legitimate claims to recognition as a 'private' organization...." Weise v. Syracuse University, 522 F.2d 397, 407 (2d Cir. 1975).

Regardless of the approach employed, the result is the same; Yeshiva's termination of Mrs. Carrion's employment did not constitute state action.

(1) No Governmental Aid, Entanglement or Approval

Plaintiff has predicated her joint participation contention almost exclusively upon state involvement purportedly stemming from the affiliation contract between Yeshiva and the City. Plaintiff argues that because the City provided and maintained the physical premises of Lincoln Hospital and had general supervisory powers over hospital policy, Yeshiva's activities are the equivalent of the state's. Plaintiff has overlooked, or perhaps avoided, the critical fact that the affiliation agreement has no nexus with the dismissal challenged herein. Yet this Court in Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) explicitly held that the existence of such a nexus is a prerequisite of state action.

> "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a

> plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint." Powe, 407 F.2d at 81.

See also Jackson v. Metropolitan Edison Co., ___U.S.___, 95 S.Ct. 449, 453 (1975).

There is no nexus between the affiliation contract and the dismissal of plaintiff. That agreement, with a single exception, specifically leaves to Yeshiva the right to determine its own employment and discipline practices. The exception, Paragraph "7" (237a), gives the City certain limited powers, not exercised, to order Yeshiva to dismiss an employee in exceptional circumstances not applicable here; Mrs. Carrion's termination was undertaken solely pursuant to Yeshiva's own discretion. As the affiliation contract shows, what the City wanted least of all was to become entangled in Yeshiva's internal management of its employees. Cf. Wahba v. New York University, 492 F.2d 96, 100 (2d Cir.), cert. denied, 419 U.S. 874 (1974).

Yeshiva's consultation of Mr. Shulman, a City employee, is not proof of any nexus. Mr. Shulman acknowledged that only Yeshiva could terminate plaintiff's employment. He also severely criticized Yeshiva's procrastination in the face of abundant cause (114a). That admission of governmental impotence does not provide the missing link.

Plaintiff also did not prove Yeshiva's financial (or other) dependency upon the City. The mere existence of the arms-length affiliation agreement is a far cry from substantial financial dependency. Compare Rackin v. University of Pennsylvania, 386 F.Supp. 992 (E.D. Pa. 1974) with Grossner v. Columbia University, 287 F.Supp. 535 (S.D.N.Y. 1968). Furthermore, the contract does not connote state approval of the challenged activity as in Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).

The lack of any state nexus with the challenged activity, together with plaintiff's failure to adduce favorable proof, resolve the first three factors in Yeshiva's favor. Mrs. Carrion attempts to evade this adverse result by contending that the absence of state involvement in the challenged activity is "not dispositive" (Appellant's Brief at 27 n.19). However, even the "joint participation" must be related in some fashion to the challenged activity. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961); Holodnak v. Avco Corp., 514 F.2d 285, 289 (2d Cir. 1975); Perez v. Sugarman, 499 F.2d 761, 766 (2d Cir. 1974).[33/]

No proof of any such relationship, much less a nexus, was adduced by Mrs. Carrion. Assuming, arguendo, that there was a joint relationship because of the mere operation of the

33/ Plaintiff recognized the need for the state to become a "'joint participant' in the challenged activity" (Appellant's Brief at 24). However, she subsequently ignored that requirement.

affiliation contract, it related only to the provision of medical and ancillary services to the public, not to the hiring and firing of personnel. Lefcourt v. The Legal Aid Society, 445 F.2d 1150 (2d Cir. 1971). Thus, there was no "joint participation" in Carrion's dismissal for insubordination. Furthermore, even assuming that state action can be predicated upon a joint participation unrelated to her dismissal[34/], plaintiff is still faced with a failure of proof because no joint participation was demonstrated within the meaning of Burton and its progency.

In Burton the Supreme Court held that the racially discriminatory practices of a restaurant serving the public constituted state action because the state had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity". 365 U.S. at 725. This case is strikingly different from Burton. The challenged firing was not integral to the success of the City's endeavors to provide hospital care. It was not adverse to the City's purpose in contracting with Yeshiva. The City did not place its power, prestige and authority behind Carrion's dismissal.

The primary similarity between this case and Burton is that the private enterprise utilized premises owned and

34/ Rackin v. University of Pennsylvania, supra at 1003, may imply that no connection is needed. If that implication is correct, which Yeshiva does not concede, plaintiff is still faced with an extremely heavy and unsatisfied burden of proof. Perez v. Sugarman, supra at 766 n.6.

supplied by the government. However, in Lefcourt v. The Legal Aid Society, supra, a case remarkably similar to this one, the private use of governmental buildings and offices was held to be of little consequence. See also Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), cert. denied, 44 U.S.L.W. 3328 (U.S. Dec. 2, 1975), where the refusal of a private corporation operating a hospital for a county to perform abortions was not state action.[35/]

In contrast to the minimum state entanglement of Lefcourt is Holodnak v. Avco Corp., supra,[36/] where a defense contractor was so overwhelmingly financially dependent upon the United States that it acted in complete accordance with governmental interests in matters of mutual concern. 514 F.2d at 289-90. See also Weise, supra at 407 n.11. As noted, no such financial dependency was proven. (See p. 58, supra).

There is also an important analytical difference between the situation in Holodnak and that herein. There the government had entered a traditionally private field to place its "power, property and prestige" behind the challenged activities of the private partner. 514 F.2d at 289. The federal government had virtually swallowed up the private

35/ But see O'Neill v. Grayson County Way Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973).

36/ Holodnak is the second of three cases upon which appellant places primary reliance. The first is Powe v. Miles, discussed supra. The third is McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971). McCabe is irrelevant because the hospital policy respecting sterilization was concededly that of a public, not private, body.

enterprise for its own purposes. Here the City merely retained Yeshiva, by an arms-length agreement, to render professional services. It did not move into Yeshiva's traditional field and usurp its authority. Instead, it adopted an explicit "hands off" position toward Yeshiva's internal employment practices.

This case is far closer to Lefcourt than Holodnak. Mrs. Carrion only proved the existence of a limited contractual arrangement, and nothing more.[37/] She failed to prove that the City was "significantly involved" and a partner in her firing. Thus Mrs. Carrion failed to prove "joint participation". That failure of proof, together with the weighing in Yeshiva's favor of the first three Weise factors, warrants the rejection of plaintiff's state action claim.

(2) No Public Function

Plaintiff has argued that the provision of hospital care by a City hospital is a public function. That argument is irrelevant; it is the medical activities of Lincoln Hospital, not the employment practices of Yeshiva, that would be embraced by that doctrine. The public function approach is limited to "situations where the constitutional violation alleged occurred in the very activity in which the private institution performed its 'traditionally governmental

37/ The mere existence of "mutual benefits" does not by itself, as plaintiff would have it, alter the relationship of the parties. If that were the case, virtually every contract with a governmental agency would transform the private party into a state actor. See Grossner v. Columbia University at 547-48.

function'. [footnote omitted]". Barrett v. United Hospital, 376 F.Supp. 791, 799 (S.D.N.Y. 1974), aff'd no opinion, 506 F.2d 1395 (2d Cir. 1975) (emphasis in original).

As further explained by the District Court:

> "Even if it may be successfully argued that a private hospital is performing a public function it is clear that the function involved is the admission of the treatment of patients, not the hiring and firing of doctors, nurses and other staff personnel. [footnote omitted]" Id. at 799. See also Perez v. Sugarman, supra at 765.

Application of this theory is also limited to traditional governmental functions. While the provision of hospital care is laudable, it is not a traditional governmental function in the nature of public parks [Evans v. Newton, 382 U.S. 296 (1966)], political party primaries [Terry v. Adams, 345 U.S. 461 (1953)], and service of process [United States v. Wiseman, 445 F.2d 792 (2d Cir.), cert. denied, 404 U.S. 967 (1971)]. Like higher education (Powe v. Miles, supra), the provision of medical care is not a public function.

(3) Yeshiva Has Legitimate Claims as a Private Institution

This fifth factor requires the weighing of Yeshiva's claims as a private institution to be free of governmental constraints against the offensiveness of the challenged conduct. Weise, supra at 404-405; Wahba v. New York University, supra at 101. The conduct of Yeshiva challenged by plaintiff - the imposition of discipline - is far less offensive than racial or other class based discrimination [Weise, supra at 406] or the abridgement of First Amendment rights [Holodnak,

supra at 290]. Yeshiva also has a valid claim to the right to exercise its discretion in the hiring and firing of personnel. Wahba v. New York University, supra. Cf. Faro v. New York University, 502 F.2d 1229, 1232 (2d Cir. 1974). Thus, this factor is weighed in favor of Yeshiva.

(4) Summary

The overall balancing process envisioned by Weise leads to the same conclusion reached by this Court when it posited the hypothetical case now before it:

> "[I]t may well be that the principle of Burton v. Wilmington Parking Authority would not require a finding of state action or, in any event, of unconstitutional state action if the coffee shop involved in that case dismissed a waitress without notice and hearing...." Powe v. Miles, supra at 83. Cf. Barrett v. Miles, supra at 799 n.37.

Similarly, Yeshiva's firing of Mrs. Carrion was not state action.

III.

THE DETAILED FINDINGS OF FACT THAT PLAINTIFF WAS NOT DISCRIMINATED AGAINST BECAUSE OF HER RACE WERE NOT CLEARLY ERRONEOUS

Mrs. Carrion makes two arguments with respect to the District Court's findings of fact. Initially, plaintiff relies on her discredited testimony to argue that the findings are unsupported by the record. Her second argument is that a prima facie case within the meaning of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) was presented. An examination of the record will show that both arguments are without merit.

(a) No Demonstration That Findings Of Fact Were Clearly Erroneous

The detailed findings of fact in this case preclude any determination by this Court that the Trial Court committed error in dismissing the complaint at the close of plaintiff's case.[38/] The appellant must show that those findings were "clearly erroneous" pursuant to Rule 52(a), Federal Rules of Civil Procedure. Pan American World Airways, Inc. v. Aetna Casualty and Surety Co., 505 F.2d 989 (2d Cir. 1974). Although Mrs. Carrion's brief conspicuously does not mention this difficult burden created by Rule 52(a), it is clear that this Court must have a distinct and firm conviction that a mistake has been made by the Trial Court before it can reverse. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Plaintiff's burden in successfully attacking the findings of fact is increased as the District Court, sitting without a jury, found that her testimony was untruthful and could not be believed (136a, 301a, 302a). Essentially all of the evidence offered by Mrs. Carrion to show racial discrimination emanated from her testimony. Because the credibility of a witness is within the particular province of the Trial Judge, it follows that Mrs. Carrion's discredited testimony cannot be considered by this Court as a

38/ The District Court dismissed the complaint pursuant to its authority under Rule 41(b). At this point, of course, the court was entitled to weigh the evidence and resolve any conflicts in it and decide for itself where the preponderance lay. See e.g. Weissinger v. U.S., 423 F.2d 795, 798 (5th Cir. 1970).

basis for setting aside the judgment. United States v. Massachusetts Bonding and Insurance Co., 303 F.2d 823, 827 (2d Cir.), cert. denied, 371 U.S. 942 (1963).

Nevertheless, Mrs. Carrion attacks the findings by crediting her testimony and treating the remaining evidence with cavalier disdain. Thus, she argues that there was no basis for the Court's finding that Cagan believed she was unprepared to take a cut in salary with respect to the first position despite the clear evidence to the contrary. (See pages 9-10 supra). It also ignores the objective facts recited by Cagan, whose testimony was introduced by Mrs. Carrion (See pages 9-10 supra). Mrs. Carrion blandly contends that the District Court should have believed her testimony that she applied for the second job when her prior testimony and Cagan's testimony were to the contrary (See pages 11-13 supra). Similarly, Mrs. Carrion would have this Court accept her testimony with respect to Dr. Smith's alleged statements relating to the third position when the Court believed Smith and disbelieved Carrion (See pages 13-15 supra). Mrs. Carrion's argument that her suspension and discharge were really Yeshiva's retaliation for filing complaints with the Commission completely ignore her odious attempts to defame Cagan and the disruption that effort created at Lincoln Hospital (See pages 16-23 supra).

Undoubtedly in recognition of the fact that the record cannot support a "clearly erroneous" conclusion, Mrs. Carrion also argues that a prima facie case was presented.

(b) Absence of a Prima Facie Case

As indicated, the second argument advanced is that the District Court erred in dismissing the complaint because Mrs. Carrion made out a prima facie case under the standards of McDonnell-Douglas v. Green, supra (Appellant's Brief at 54).

In McDonnell-Douglas, the Court set forth four factors which a Title VII plaintiff must prove to present a prima facie case. These are: (1) that he is a member of a racial minority; (2) that he applied for and was qualified for a job; (3) that he was rejected; and (4) that following his rejection, the job was held open to persons of like qualifications. Id. at 802.

With respect to each of the promotions at issue, even a cursory review of the record demonstrates that Mrs. Carrion did not introduce credible evidence to meet these criteria. Thus, even if we assume that Mrs. Carrion applied for the first job, it was not "held open" for another but filled by someone who was then considered superior (165a-166a). Carrion did not apply for the second position, nor was it held open (85a-86a). Nor were the McDonnell-Douglas criteria met for the third position, as that position was awarded to another person regarded as a "front-runner" and more qualified (R.44, p. 153).

However, even if Mrs. Carrion did meet these criteria, the District Court still did not err in dismissing the complaint as it was, we submit, convinced that the preponderance of the evidence clearly demonstrated an absence of any

discriminatory animus on the part of Yeshiva.[39/] The findings that there were legitimate non-discriminatory reasons for each denial of promotion as well as the suspension and discharge are sufficient grounds for the District Court's conclusion that Mrs. Carrion was not the victim of discriminatory employment practices. McDonnell-Douglas, supra at 802.

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETIONARY AUTHORITY BY DECLINING TO ADJOURN THE TRIAL

Mrs. Carrion argues that the Trial Judge erred by refusing to adjourn the trial. The adjournment of a trial lies within the sound discretion of the Trial Judge and appellant must demonstrate an abuse of that discretionary authority to prevail here. Payne v. Capital Transit Co., 181 F.2d 613 (D.C. Cir. 1950). On this record, there is not even a suggestion of abuse.

Thus, during the afternoon of the second day of the trial, plaintiff's counsel informed the Court that he could not continue because he had permitted a witness, a Mr. Richard Weeks, to leave the Court (127a, 130a). The Court, however, was reluctant to adjourn the trial until the next day and, upon inquiry, was informed that Weeks had testified

39/ The District Court, under Rule 41(b) Federal Rules of Civil Procedure, was not limited to a mere determination of whether or not Mrs. Carrion made out a prima facie case. Ellis v. Cantor, 328 F.2d 573, 577 (9th Cir. 1964).

before the Commission with respect to alleged racial discrimination in the Mental Health Unit at Lincoln (128a). Counsel stated that Weeks was expected to repeat his 1969 testimony before the Commission, and that in addition, he would testify that he spoke with Silverberg after the suspension and informed Silverberg that the suspension was unjustified (128a-129a).

The following colloquy and events ensued:

> "THE COURT: Why don't you read in his testimony. I can't be responsible for your letting witnesses go when you have got the whole afternoon here. I will let you read in his testimony at the Human Rights Commission.
>
> MR. GRAY: May I submit it to the Court?
>
> * * * *
>
> THE COURT: May I have that? That should be up here. We will take a short recess while I read these.
>
> (Plaintiff's Exhibit 31 received in evidence.)
>
> (Recess.)" (130a).

Accordingly, the record shows that Weeks' testimony (270a-277a) was actually examined by the District Court.[40/] Mrs. Carrion argues that the testimony of Weeks was of importance to her case (Appellant's Brief at 57). To enhance this importance, Mrs. Carrion argues further that "there is no reason for believing that Weeks' testimony before Court would be identical with the testimony before the Human

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40/ Weeks' testimony before the Commission was marked for identification as Plaintiff's Exhibit "31", and although there was no formal offer of the Exhibit into evidence the record reflects its introduction into evidence (130a).

Rights Commission". (Appellant's Brief at 58). The reason for this speculation is that Mr. Weeks' testimony before the Commission could have no possible effect on the outcome of the trial in the District Court. Unfortunately for Mrs. Carrion, her trial counsel indicated that the only substantive addition to the testimony before the Commission would be the fact that Weeks spoke to Silverberg and protested the suspension of Mrs. Carrion, a fact of no probative value. Mrs. Carrion further contends that it is not clear whether Weeks' testimony was before the Court as an offer of proof or as evidence. The short answer to this is it really doesn't matter as Weeks' testimony could not have affected the outcome of the trial.

Mr. Weeks' testimony consisted of vague generalities about employment practices at Yeshiva. Indeed, Weeks was keenly aware of his limitations, and he pointedly stated that he could only testify with respect to his unit, the Mental Health Unit at Lincoln (270a, 274a).[41/] Of course, this was not the department that employed Mrs. Carrion (274a). The profferred testimony, to the extent that it dealt with anything outside of the Mental Health Unit, merely is an expression of general support for Mrs. Carrion. It does not, as appellant asserts, demonstrate the existence

41/ At one point in his testimony before the Commission, Weeks was asked if there were any Black or Puerto Rican Department heads at Lincoln. Weeks replied:

"As I said, my knowledge of the other services is quite limited. In terms of the mental health services I can only comment with some degree of accuracy on that. I don't know with respect to social services and other aspects of the departments." (274a) (emphasis supplied).

of any "general pattern of discriminatory conduct" on the part of Yeshiva (Appellant's Brief at 54).

Accordingly, the fact that Weeks' testimony could have absolutely no bearing on the outcome of the trial demonstrates the absence of even a scintilla of evidence indicating an abuse of discretion. Scofield v. Le Tulle, 103 F.2d 20 (5th Cir. 1939). See also Payne v. Capital Transit Co., supra.

CONCLUSION

The decision of the District Court should be affirmed.

Dated: New York, New York
February 17, 1976

Respectfully submitted,

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375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

U.S. COURT OF APPEALS FOR THE SECOND CIR CUIT

CARRION

VS

YESHIVA U.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF N.Y. , ss:

Afrim Haskaj being duly sworn,

deposes and says that he is over the age of 18 years and resides at 1481 42nd st Brook

That on the 17th day of february, 1976 19 at

he served the annexed brief for defendant-appellee upon Rabinowitz, Boudin & Standard, 30 East 42nd Street, NY, NY

in this action, by delivering to and leaving with said attorneys three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 17th day of february, 1976 19

Afrim Haskaj

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19 77